



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

October 22, 1996

Mr. Scott A. Kelly
Assistant General Counsel
Office of the Vice Chancellor
The Texas A&M University System
John B. Connally Building
301 Tarrow, Sixth Floor
College Station, Texas 77843-1230

OR96-1912

Dear Mr. Kelly:

On behalf of the Texas A&M Research Foundation and The Texas A&M University System, you ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. We assigned your request ID# 36295.

The Texas A&M Research Foundation (the "foundation") and The Texas A&M University System (the "system") each received an open records request for a copy of the winning response to a certain request for proposals and for a copy of the contract awarded. As a threshold matter, you contend that the requested information is not subject to the Open Records Act. You indicate that the request seeks documents relating to a contract entered into by the foundation, not the system, and argue that the foundation is not a governmental body for purposes of the Open Records Act. If we conclude that the information at issue is subject to the Open Records Act, you also contend that sections 552.101, 552.104, and 552.110 of the Government Code except the requested information from disclosure.

Without more information, this office cannot determine whether the requested information is subject to the Open Records Act. The requested information would be subject to the Open Records Act if the foundation is a governmental body, if the system is a governmental body that collects and maintains this information regardless of who created it, or if the system has a right of access to or ownership of the information. See Gov't Code §§ 552.002, .003. Neither you nor the attorney for the foundation have provided this office with enough information about the foundation and its relationship to the system for us to make this kind of determination. If the requested information is not subject to the Open Records Act, neither the system nor the foundation is required by the Open Records Act to release the requested information. If, on the other hand, the information is subject to the Open Records Act, we have addressed the exceptions the attorney for the foundation raises.

We conclude that section 552.101 does not except from disclosure any of the requested information. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section applies to information made confidential by specific statutes and to information considered private under the concepts of common-law privacy and constitutional privacy. See Open Records Decision No. 584 (1991) (information concerning welfare recipients made confidential by the Texas Human Resources Code); *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976) *cert. denied*, 430 U.S. 931 (1977) (court considers claims of both constitutional and common-law privacy; court concludes common-law privacy excepts from disclosure some requested information).

We are not aware of any statutes that make the requested information confidential. Furthermore, neither common-law nor constitutional privacy makes any parts of the requested information confidential. The common-law right of privacy as section 552.101 incorporates it protects only information that is both highly intimate or embarrassing and of no legitimate public interest. See *Industrial Found.*, 540 S.W.2d at 685. None of the information you submitted for review is highly intimate or embarrassing. The constitutional right of privacy as section 552.101 incorporates it protects two related interests: (1) the individual's interest in independence in making certain kinds of important decisions, and (2) the individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 478 (1987) at 4. The first interest applies to the traditional "zones of privacy": marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second protects against "invasions of privacy involving the most intimate aspects of human affairs." Open Records Decision No. 455 at 5 (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490, 492 (5th Cir. 1985) *cert. denied*, 474 U.S. 1062 (1986)). The information you submitted for review does not involve the traditional zones of privacy nor does it involve the most intimate aspects of human affairs. Therefore, you may not withhold any of the requested information under section 552.101.

We also conclude that you may not withhold any information under section 552.104. The foundation received the request for information at issue here in February of 1995. The system received the request for information at issue here on September 7, 1995. However, this office did not receive a request for a decision until October 6, 1995. A governmental body is required to request a decision from this office within ten days of receiving a request for information if it wants to withhold the information. Gov't Code § 552.301. When a governmental body fails to request a decision within ten days of receiving a request for information, the requested information is presumed to be public. See Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.--Austin 1990, no writ). This presumption of openness can be overcome only by a compelling demonstration that the information should not be made public. See, e.g., Open Records Decision No. 150 (1977) at 2 (presumption of openness overcome by showing that information is made confidential by another source of law or affects third party interests). Both sections 552.101 and 552.110 are mandatory exceptions and represent compelling reasons to withhold information. However, section 552.104 protects the interests of governmental bodies, not third parties. Open Records Decision No. 554 (1990) at 3. Therefore, no compelling reasons exist to withhold the information under section 552.104.

Finally, we conclude that you may not withhold the requested information under section 552.110. Section 552.110 of the Government Code protects trade secrets from required public disclosure. The Texas Supreme Court has adopted the definition of trade secret from the Restatement of Torts, section 757 (1939). *See Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958); RESTATEMENT OF TORTS § 757 cmt. b (1939). This office considers six factors listed by the Restatement to determine whether information is a trade secret.¹ The governmental body or the company whose records are at issue must make a prima facie case for exception as a trade secret under section 552.110. *See Open Records Decision No. 552* (1990) at 5. None of the three entities involved here have made a prima facie case that the information at issue here is a trade secret. In fact, no one even attempted to explain how the six factors apply to the information at issue in this case. Therefore, we have no basis for concluding that any of the submitted information is excepted from required public disclosure as trade secrets under section 552.110.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request, and you should not rely on it as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Loretta R. DeHay
Assistant Attorney General
Open Records Division

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¹These six factors are

1) the extent to which the information is known outside of [the company's] business; 2) the extent to which it is known by employees and others involved in [the company's] business; 3) the extent of measures taken by [the company] to guard the secrecy of the information; 4) the value of the information to [the company] and to [its] competitors; 5) the amount of effort or money expended by [the company] in developing this information; and 6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Enclosures: Submitted documents

cc: Ms. Ricki L. Holliman
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(w/o enclosures)